

STATE OF NEVADA
DEPARTMENT OF EDUCATION
DUE PROCESS HEARING
IN THE MATTER OF

STUDENT, by and through his Parents,)

)

)

Petitioner,)

)

Nilsine Hansen

Impartial Hearing Officer

vs.)

)

)

CLARK COUNTY SCHOOL DISTRICT,)

)

)

Respondent,)

)

Hearing conducted on:

August 17 through 21, 2009

August 28, 2009

Hearing conducted at:

Nova University

8945 West Russell Road

Las Vegas, NV

Petitioner represented by:

Marianne Lanuti, Esq.

Respondent represented by:

Phoebe V. Redmond, Esq.

Personally identifiable information is included in Appendix A.

DECISION AND ORDER

INTRODUCTION

This due process hearing involves a four-year-old boy who is currently eligible for services as a Student with Multiple Impairments and Health Impairment. At the time of the occurrences that are the subject of this due process the Student was placed in a pre-school special education program in the School District. The due process is filed under Nevada Administrative Code (hereinafter NAC) Chapter 388, section 388.310 and the Individuals with Disabilities Education Act (hereinafter IDEA) Title 34 C.F.R. Sections 300.507 through 300.518, inclusive.

The request for hearing was received by the School District on May 15, 2009, and forwarded to the State Superintendent of Public Instruction. The Hearing Officer was appointed on May 18, 2009.

PROCEDURAL BACKGROUND

An initial status conference call was scheduled with the parties and the Hearing Officer on June 9, 2009. This call was completed but was very brief. The resolution period was not waived. A second call was scheduled for June 16, 2009. At the request of the parties, the dates for the hearing were set as August 17 through 21, 2009, to accommodate the schedules of each party. The parents had scheduled a private evaluation of the student and the earliest date for this evaluation to occur was June 29. In order to allow time for the evaluation and a report to be generated and shared, the parties agreed that the August dates were the first available to them for the hearing. An extension was granted to August 31, 2009. Disclosure was set for August 10 and a witness-scheduling conference call was set for August 11.

The student was withdrawn from his school program and the parents are providing an intensive home intervention program. The District asserts that they are willing and able to accommodate the student in their school program.

A pre-hearing conference call was held on July 22, 2009, to determine the arrangements for the hearing. Questions arose as to whether the hearing was to be open or closed; it was ultimately decided by the Parents that it would be closed. Parents and their representative requested that the hearing be held closer to the Parents' home. The District investigated sites in proximity to that location but was unable to obtain space in any of the suggested locations. The site finally selected was within approximately 20 minutes of the Parents' home. The Petitioner began his case first and bore the burden of proof. Witnesses were sequestered. No special accommodations were needed for Petitioner. The District requested some accommodations for witnesses who were identified as having health issues which might interfere with their testimony. Those requests were granted and the accommodations noted. These were dealt with as the hearing progressed. The accommodations were minimal, consisting primarily of a possible need for short nutrition breaks, a need to stand and an awareness of some minor physical accommodations.

The parties were unable to agree upon any stipulated facts other than the basic information of name, date of birth, residence, school of attendance, category under which the student is eligible for special education services and the date of original declaration of eligibility.

It was agreed during the pre-hearing conference calls that the District would submit all IEPs for the Student and all District-provided evaluations. The District's submission was relied upon during testimony for noting page numbers.

Petitioner waived the right to an oral opening statement and submitted instead a written opening statement that was accepted. Respondent waived the right to an opening statement.

Both Petitioner and Respondent called many of the same witnesses and rather than calling these witnesses twice, once for each side, it was decided that they would appear one time, each party would have an opportunity for direct examination followed by an opportunity for cross examination for each attorney.

Testimony was offered by the Mother and Father of the Student, a Psychologist, a Neuropsychologist, a School Psychologist, a Private Speech Pathologist and Speech Pathologist 1 and Speech Pathologist 2 employed by the School District, a School Nurse, a School Principal, an Early Childhood Special Education Teacher, three Special Education Teacher Aides, an Early Childhood Special Education Coordinator, a Physical Therapist and an Occupational Therapist, both employed by the School District, a Special Education Advocate employed by the Petitioner's attorney, a member of the School District's Low Incidence Team, a Lovaas Program Supervisor employed by the Parents, and an Instructional Coordinator and Behavior Mentor Teacher employed by the School District.

The Hearing Officer chose to admit exhibits as they came in through testimony rather than admit all exhibits at the beginning of the hearing. Not all of the evidence that was exchanged was submitted or admitted. Several page numbers were modified from those originally submitted. In one instance, there was an objection to the admission of a two-page memo without the first page. The first page was found overnight and the two together submitted for inclusion and re-numbered P197a and P197b. These had originally been submitted under the numbers P 197 and P 202. Several other documents in the Petitioner's submission were renumbered in order to group them together in a more logical manner. This was done with the assistance of the author of these documents, the Psychologist, and the numbers under which they were admitted were circled in red to indicate the new number.

The hearing was held on August 17 through 21 and August 28, 2009. An additional day of hearing was requested by the Parties on August 20, 2009. The Hearing Officer granted this extension and set August 28, 2009, as that additional day. At the end of the hearing after presentation of oral closing arguments, the record was closed as of 4:45 p.m. on August 28, 2009. No additional evidence was taken and no additional documentation was admitted. The decision in this matter is to be mailed to the parties on Monday, September 7, 2009. The date for delivery of service will be the date of receipt of the mailed copy.

ISSUES

1. Did Respondent provide Petitioner with a free appropriate public education during the 2008-2009 school year, both procedurally and substantively? The issues cited below are the sole issues raised by Petitioner and are the only ones before the Hearing Officer. The Petitioner specifically alleges that the Respondent:
 - a. Prevented the Parent from a meaningful participation in the IEP process by predetermining educational placement in November of 2007 and in

September of 2008 selected a placement based on economic factors rather than Student need;

- b. Failed to consider the medical and behavioral material presented by Petitioner to the IEP team;
- c. Failed to consider the unique needs of the child as required by IDEA both with regard to his diagnosis of autism as well as that of Angelman Syndrome;
- d. Failed to fulfill its duty to confer meaningful education progress. The District's proposed program must address the Student's unique needs, provide some educational benefit and comport with the IEP. In the instant case, Petitioner alleges that Respondent has failed to provide Petitioner with appropriate supplementary services by failing to implement behavioral supports. It is alleged that Petitioner requires a one-to-one aide through the school day in order to benefit from his education.
- e. Failed to recognize that Student requires positive behavior supports composed of individualized interventions that foster positive changes in behavior that are observed in school, home and community. The Petitioner alleges that the program provided to Petitioner lacked the utilization of frequent and systematic positive reinforcement scheduling.
- f. Failed to appropriately place Student as of September, 2008, and instead placed him in a placement which was medically unsafe and failed to address the possibility of bodily harm or self-injury.

The proposed resolutions of this issue are as follows:

1. Compensatory education for the deprivation of a free appropriate public education (FAPE) for the period of August 25, 2008, to resolution of this matter.
2. Evaluation for Sensory/Oral Motor functioning and recommendations for therapy.
3. An Aide trained in Applied Behavioral Analysis (ABA) to provide one-to-one intervention to ensure Student's safety and educational benefit through the school day and recited as such in the IEP.
4. Reimbursement for Student's intensive home behavioral intervention consisting of ABA to eliminate or reduce Student's self-injurious behaviors and to provide an opportunity to benefit from his educational environment.
5. Collaboration between the home and school components pertaining to training of staff.
6. An educational placement location change.
7. Any other relief deemed fair and proper.

FINDINGS OF FACT

The numbering system used below is as follows: (D + number) refers to District's document number; (P + number) refers to Petitioner's document number and (T + day) refers to Testimony by an individual on a given day. The transcript of this hearing was not available in time for use by the Hearing Officer in writing this decision.

1. The Student was born on September 2, 2004, and was made eligible under the categories Multiple Impairment and Health Impairment on October 11, 2007. (See IEP at D 182-200 and Multi-disciplinary Team Reports D 134-148 and D164-175)
2. The Student is a resident of Clark County and was enrolled in a special education pre-school program located in the elementary school to which he is normally zoned. (D 182)
3. The request for due process refers to the school year 2008-2009. The IEPs upon which the education of the student was based began with the original IEP dated October 11, 2007, which was still in effect on August 25, 2008, although it had been both reviewed and revised. (Testimony of the teacher and the annual review IEP dated November 21, 2008, D 309-333).
4. "Angelman Syndrome (AS) is a neuro-developmental disorder that is caused by the lack of function of the maternal copy of the UBE-3A gene on chromosome 15 and is characterized by severe intellectual disability, seizure disorder, motor dysfunction, absent or minimal expressive speech and happy demeanor with frequent bouts of laughter (Angelman, 1965; Williams et al, 2005)." (P 426)
5. A District Multidisciplinary Team (including the Parents) evaluated the Student on September 18, 2007. (D 164 – 175)
6. At the time of the initial evaluation, the Student demonstrated the following Present Levels of Performance which were made a part of the IEP developed for the Student on October 11, 2007:
 - a. Severe delays in all areas of communication
 - i. Communicates by vocalizing to indicate something he wants
 - ii. Reaches for an object he wants
 - iii. He has been exposed to a few signs but is not yet using these symbols with noticeable consistency
 - iv. Has no recognizable words
 - b. Significant oral-motor problems and feeding/swallowing issues
 - c. Not yet activating simple switches on toys
 - d. Becomes vocally excited when he sees a familiar person; uses lax, open vowels with limited sound differentiation; limited control of oral structures; voice volume and range are adequate.
 - e. Does not show understanding of basic routine language ("Time for bath" "Let's go bye-bye", etc.)
 - f. Does not express a preference when given a 2-way choice
 - g. Does not identify common objects
 - h. Enjoys listening to music
 - i. Will visually regard pictures for brief periods

- j. Diagnosis of Angelman Syndrome and epilepsy (current medications are Zonegran and Depakote daily). If he has a seizure lasting longer than 5 minutes, he is to be treated with Clonazepam.
- k. Began to walk at age two; needs a hand for stability.
- l. Difficult to gain and sustain his attention with any objects
- m. Could walk independently for a few steps before falling
- n. He eats a variety of goods that are cut small and are soft; he tends to move his mouth up and down to bite but does not swirl the food around with his tongue
- o. He can tolerate thin liquids if he is seated correctly and his neck is not hyperextended.
- p. He was unable to be formally assessed on most portions of the direct cognitive assessment. According to his Mother's report, he follows auditory stimulus; also follows visual stimulus and tracks objects; does not appear to show awareness of new situations; recognizes himself as cause of events or happenings; sometimes demonstrates object permanence; may pick up an object briefly then release it; does not respond to one or one more; does not identify familiar objects by their use; does not point to at least one body part on himself or on a doll when asked; does not respond correctly when asked to identify an object pictures in a book or magazine; does not identify colors or shapes.
- q. Self-help skills: He eats a regular diet and a variety of foods; does not use utensils to feed himself and his caregivers feed him; he does feed himself finger foods; he drinks from a Sippee cup with assistance; sucks from a straw; he is diapered and does not give any indication to use the bathroom; does not urinate/defecate in the toilet or potty chair; he needs assistance to wash and dry hands; he does not dress himself; he may remove his shorts or diaper at times; he has no awareness of danger; he does not put away toys or possessions when asked.
- r. Fine motor skills: He may sometimes reach for a toy or object; he uses a pincer grasp; he seldom moves or transfers objects from one hand to another; he removes objects from a container and also puts objects back into a container; he does not turn the pages of a book one at a time; he does not stack blocks or other small objects; he does not build 3-D structures; he does not unwrap small objects; he does not complete simple inset puzzles of at least two pieces or shapes; he does not use a twisting hand motion to unscrew or screw the lid of a container; he does not hold a pencil in the proper position; observed to use his left hand to grip a pencil in a fist; and he does not have experience with using scissors to cut paper.
- s. Gross motor skills: He learned to ambulate when he was two years old; he has an unsteady and stiff gait; he may trip as he wanders about and walks aimlessly not watching; he may still crawl to get something quicker; he has not run yet; he does not jump up and down with both feet off the floor; he does not hop on one foot at least once; he does not walk up and down stairs, putting both feet on each step; he does not climb on and off play equipment; he does not yet roll a ball, throw a ball, kick a ball or catch a ball; and he will sit on a tricycle and place his feet on the pedals, but he does not pedal as of yet.
- t. Social-behavioral skills: He does not have simple conversation; he does not answer when familiar adults make simple small talk; he does not say "please" or "thank you"; he shows two or more recognizable emotions; he tries to make social contact with others by smiling at them; he shows a little interest in children the same age by smiling at them and walking away; he does not show any preference for a particular child over another; he does not demonstrate

friendship-seeking behaviors with others the same age; he tends to play by himself and will not interact or play with others; he does not parallel play; he does not choose to play with other children or seek them out; he enjoys simple interaction games like peek-a-boo or patty-cake; he prefers inanimate objects like empty cups or containers which he opens or closes repeatedly; he also drops objects in and removes them repeatedly; he does not imitate simple movements like clapping his hands or waving bye-bye; he does not engage in simple make-believe or pretend play; he does not understand the reciprocal process of sharing or turn-taking; and he sometimes changes easily from one at-home activity to another. These Present Levels of Performance were incorporated into the IEP developed on October 11, 2007. (D 164 – 175 and D 183 – 190)

7. Measurable goals and objectives were developed for the Student based upon his present levels of performance during the IEP meeting on October 11, 2007, and these include:
 - a. Goal 1: Develop purposeful behaviors to functional levels such as requesting an object; indicating “more” or “do again”; and responding to or showing an understanding of three or more functional phrases.
 - b. Goal 2: Demonstrate improved pre-academic skills during a variety of tasks and activities such as appropriate play with cause and effect toys; imitating a variety of motor movements; responding to his name, “No”, “Stop”, and touching three body parts upon request.
 - c. Goal 3: Demonstrate improved fine-motor skills by transferring objects between hands; completing form-board puzzles of 1–3 pieces; and performing bilateral hand activities such as dump/fill, opening/closing lids.
 - d. Goal 4: Increase functional ambulation skills by taking 3-5 steps between furniture independently; be aware of and avoid obstacles in his path; and with one hand held walk to keep pace with his peers in the class.
 - e. Goal 5: Demonstrate independent self-help skills by pushing/pulling pants up and down for toileting; removing coat/backpack; tolerating sitting on the toilet and washing and drying hands independently.
 - f. Goal 6: Demonstrate social interactions with a variety of peers and adults by playing near peers with the same toy; playing simple interaction games for three or more exchanges; and responding to social greetings.
 - g. Goal 7: Demonstrate appropriate classroom behaviors by learning and following classroom routine; participating in a variety of group activities; remaining in a designated area; and using toys and objects appropriately. All of the above goals and objectives were included in the IEP dated October 11, 2007. (D 192 – 295)
8. According to this same October 17, 2009, IEP the Student was to receive speech/language therapy as a direct service for 30 minutes a week; occupational therapy as a direct service for 30 minutes a week; and physical therapy as a direct therapy for 30 minutes a week and as a consultative service for 15 minutes a week. The direct therapy times were also to transfer to his Extended School Year placement. (D 196)
9. The Student was to receive transportation services curb to curb with cautions regarding the possibility of reflux (throwing up), seizures and the need to immediately administer

medication; a stroller for transportation purposes and an air-conditioned bus. These were made a part of the IEP developed on October 11, 2007. (D 197)

10. Supplementary Aids and Services which were made a part of the October 11, 2007, IEP included:
 - a. Medical alert for seizures to be shared with teachers and care givers;
 - b. Parents were asked to keep teachers and nurse updated in the Student's health status, medications and treatments;
 - c. Establish a form of home communication;
 - d. Once medical documentation is obtained re: feed, reconvene the IEP as appropriate;
 - e. Provide a structured and routine environment with close adult supervision for safety;
 - f. OT/PT will provide any necessary equipment;
 - g. [The Student] requires adult assistance in order to participate and benefit from all activities;
 - h. The Student has reflux, is on medication, continues to throw up and needs oral care (mouth rinse, etc.)
 - i. No oral food/drink until medical documentation is obtained. (D 198 – 199)
11. The Placements considered and rejected on October 11, 2007, were regular class placement with supplementary aids and services and regular class and special education class (e.g. resource) combination. The placement chosen was a self-contained program. (D 200)
12. The Justification for Placement states as follows: “[the Student] requires a modified curriculum and a variety of techniques to assist him in learning and generalizing new skills. He requires a reduced class ratio that offers individualized instruction and adult assistance in order to participate and benefit from developmental activities. [The Student] exhibits delays in all areas of development that requires an individualized education in order for him to succeed and show progress. He has previously received services through NEIS and continues to exhibit delays that require continued intervention. [The Student's] inability to communicate his wants and needs effectively with others would impact his ability to function in a regular education setting at this time. After discussing the placement considerations the IEP team determined that the only possible harmful effect may be lack of interaction with non-delayed peers.” (D 200)
13. The individuals who participated in the development of the IEP were the Parents, an LEA representative, Special Education Teacher, Regular Education Teacher, School Psychologist, Speech/Language Pathologist, School Nurse, Occupational Therapist, Physical Therapist and representative of the Student's prior Early Intervention program as required. (D 182)
14. Eligibility for an Extended School Year program was also determined at this October 11, 2007, IEP meeting. (D 201)
15. The Parents both signed in agreement with the Implementation of the IEP dated October 11, 2007, and checked the following statement: “As the parent, I agree with the components of this IEP. I understand that its provisions will be implemented as soon as possible after the IEP goes into effect.” (D 200)

16. Notice of Intent to Implement the IEP was sent to the Parents on October 24, 2007. In this notice the District proposes reconvening the IEP to consider additional documentation re: feeding and to consider the need for additional assistance on the bus and in the classroom. (D 181)
17. Prior Written Notice was provided to the Parents on October 24, 2007, of the District's scheduling of an IEP meeting on November 17, 2007, to "review/revise Individualized Education Program (IEP) and/or Educational Placement. The reasons given were "to obtain updated medical documentation for oral intake and seizures and to discuss the need for an aide on the bus due to seizures." No options were rejected, documentation needed prior to [the Student] eating at school and to determine the need for an aide on the bus. (D 202)
18. Those attending the meeting on November 16, 2007, were an LEA representative, Special Education Teacher, School Psychologist, Speech/Language Pathologist, School Nurse, Physical Therapist, General Education Teacher, Occupational Therapist, Child Find Coordinator, Early Childhood Special Education Coordinator, Occupational Therapy Coordinator, Parent Advocate and Private Speech/Language Pathologist working with the Student. (D 209)
19. The Parents presented a Doctor's report regarding the precautions to be taken when feeding the Student. [His] "current diet order calls for a regular diet, including both solids and liquids. He can be fed at school with 1:1 supervision. Due to gastroesophageal reflux disease, feeding should be given with aspiration precautions including proper positioning and no more than 2 sips at a time, until pharynx is cleared of liquids. He requires adult assistance during snack/food intake." (D 210)
20. The Parents expressed their concerns regarding his safety at school, the amount of time devoted to related services, a preference for a full day program with ABA instruction and a 1:1 aide assigned to the Student. (D 211)
21. Additional Supplementary Aids and Services added at the November 16, 2007, IEP include:
 - a. Requires frequent repetition of instruction;
 - b. Give drink 2 sips at a time, until throat is cleared of liquid, due to choking risk;
 - c. Snack needs to be one on one supervision with proper positioning;
 - d. Monitor progress, reconvene after 8 weeks of intervention to discuss IEP;
 - e. IEP team recommends that nurse meets with teaching staff during the first two weeks of school. (D 218)
22. The Placement Recommendation remained the same as it was on the October 11, 2007, IEP. (D 218)
23. The Parents disagreed with the IEP as written on November 16, 2007. (D 219)
24. The District provided Notice of Intent to Implement the IEP dated November 16, 2007. This IEP provided for specially designed instruction in Cognition, self-help, social communication and motor skills. Speech Therapy as a related service was increased to 60 minutes per week, Physical Therapy was at 30 minutes a week and Occupational

Therapy increased to 45 minutes per week. Programming for ten hours per week to provide special education services in a Self Contained Program. (D 205)

25. The District refused to take the following actions: An additional 15 minutes per week of consultation for speech/Language Therapy; an additional 15 minutes per week of occupational therapy; a full day of educational programming and a one to one assistance to be within two feet proximity of [the Student] at all times. (D 205)
26. The District refused to take the above requested actions because during discussion at the IEP, an increase in the level of Speech and Language Therapy from 30 minutes per week (direct) to 45 minutes (direct) with 15 minutes per week of consult had been added. A consultation from the Occupational Therapist would occur within the first two weeks that he attended school. "IEP team considered full day program, team rejected. [The Student] has made gains with current intervention and team determined that eight weeks of intervention, to compile data, would be necessary to determine if educational gain was being made in the proposed program." The team indicated that classroom numbers would be kept at six until at least the end of January, close adult assistance would be necessary for the Student to complete/participate in developmental activities and for safety. The Region agreed to provide a floating assistant to [the Student's] school site to assist with transition into the educational setting. (D 205)
27. The IEP team (which included the Parents) based its decision on evaluation procedures, assessments, records or reports utilized by the District as a basis for its proposed or refused actions:
 - a. The following were components of the evaluation on September 18, 2007:
 - i. Interview with the Parent
 - ii. Prenatal, birth and developmental history
 - iii. Medical history
 - iv. Health assessment
 - v. Battelle Developmental Inventory
 - vi. Developmental Profile 3 (Interview form)
 - vii. Beery Developmental Test of Visual-Motor Integration
 - viii. Vineland Adaptive Behavior Scales
 - ix. Speech/Language assessment
 - x. Occupational Therapy assessment
 - xi. Physical Therapy assessment (D 207 – 208)
28. The District rejected some options presented by the Parents on November 17, 2007, because:
 - a. It had already increased Occupational Therapy direct services from 45 minutes per week to 60 minutes per week (was originally 30 minutes per week), added an additional 15 minutes per week consult for Speech (Changed from 30 minutes per week to 60 minutes per week), increased to full-day programming. Writing in the IEP that an adult would be within 2 feet of [the Student] at all times is not necessary. An Individualized Education Program for him to receive educational benefit was based on all assessment and diagnostic information. (D 206)
29. The District assigned an additional aide to the classroom. This individual had training from the District in ABA, transferring students with physical disabilities and feeding

student with physical disabilities. She provided assistance to the Student with self-help skills as well as providing instruction toward accomplishment of the goals and objectives in the Student's IEP. (Testimony of SETA 3 on day two)

30. David Gremse, M.D, submitted a Statement of Medical Condition to the District on October 22, 2007. In it he states that the Student is under his care for gastrointestinal complication of Angelman Syndrome. (P 253)
31. The Student was enrolled in School in February of 2008, according to testimony of the School Principal. (Testimony on day four of the hearing)
32. At an IEP meeting on February 7, 2008, the IEP was modified to include training for the school staff in Applied Behavioral Analysis and Discreet Trial Training, training to the school staff on Student's needs as required and a transition from the half-day program to a full-day program. Both individuals have received this training according to their testimony. (D 222 – 232 and Testimony of the SET on day five and the SETA on day two)
33. A School District Behavior Mentor Teacher observed the Student in the classroom and school settings and issued a report dated May 15, 2008, in which she noted that the Student (received one to one attention from either the teacher or an aide as he participated in all of the classroom routines." It was also observed that the Student "best responded to directions and information presented to him when this information was given to him at his eye level, paired with a visual cue, and in trials." (D 273 – 276)
34. A six-month review IEP was completed on May 19, 2008, with meetings occurring on both April 21 and May 19, 2008. The Present Levels of Performance indicates the following:
 - a. The Student is able to sit approximately twenty minutes without the seat belt during feeding.
 - b. The Student is increasing in his ability to choose between food and drink. At times, he independently and spontaneously approximates the sign for "eat" and "drink" but does continue to overgeneralize these signs.
 - c. The Student will sit with his peers during Circle Time with some assistance from a staff member.
 - d. He has begun to scoot forward in the toy car adding to his ability to scoot backward.
 - e. He is able to independently walk both in the classroom and around the school campus although he requires frequent adult assistance (holding his hand) because he will wander off.
 - f. He is able to independently transition to and from the floor as well as pick up objects from the floor.
 - g. He is able to get into and out of classroom furniture independently and requires minimal assistance to get out of his stroller. (D 244-272)
35. The Parents submitted a three-page letter dated April 21, 2008, to the IEP team documenting their concerns. This document was made a part of the May 19, 2008, IEP. (D 258-260)

36. The Student was reevaluated by a multidisciplinary team and found eligible as a Student with Multiple Impairments/Mental Retardation and Health Impairment on May 19, 2008. (D 145-147)
37. The Student was found not eligible as a Student with Autism on May 19, 2008. The Student's Mother disagreed with this finding. (D 148)
38. The Parents disagreed with the IEP dated May 19, 2008, by stating "School District is not giving me another 24 hours to review IEP with the Advocate." (P 270)
39. The Parents took the Student to Touro University for a multidisciplinary evaluation that was completed in August of 2008. The results of this evaluation indicated that the Student was "not autistic." It was their opinion that there is substantial overlap between autistic symptomology and Angelman Syndrome and the treatment recommendations that follow rely heavily on treatments that may be better known for their use in the treatment of autism and its related disorders. Additionally, the Student's "cognitive functioning also lends itself to these types of behavioral interventions. In their opinion the Student "could benefit from intensive treatment for his behavioral symptoms." This type of therapy can serve to increase the amount of time that [the Student] is able to focus on a task as well as to improve his skills in complying with daily life demands. (P 262 – 263)
40. On September 18, 2008, the Parent requested an Intensive Intervention Services Home Program for the Student. (P 198)
41. On September 25, 2008, the Parents sent a letter to the District requesting that their son receive a designated one-to-one aide citing their reasons for this request. In that letter they state that it is their belief that "the school district must provide a Free Appropriate Public Education for our son [] regardless of cost or funding issues." (P 170 – 174)
42. In a letter dated September 25, 2008, the Student is described by his pediatrician, Dr. Hom, as having Angelman Syndrome with the following characteristics: marked delays in motor skills and speech; ataxia, hypotonia and jerky movements which make him uncoordinated and at great risk for falling. (P 95)
43. In this same letter, it is stated that the Student has seizures which are being treated by medications but which can occur unpredictably. He also has gastroesophageal reflux disorder (GERD) making him prone to aspirating and choking. (P 95)
44. On October 2, 2008, the Parents requested a Sensory/Oral Motor Evaluation to guide in eliminating the Student's lip- and cheek-biting behavior. A behavior plan to redirect him when this biting occurs was also requested. (D 431-432)
45. On November 20, 2008, a Neurologist recommended "strict seizure/fall precautions" due to Student's "almost continuous atypical absence seizures." (P 101)
46. An annual review IEP was completed on November 21, 2008. The review began on September 26, 2008 with additional meetings on October 10, November 3 and November 21, 2008. (D 285-308)
47. The Parents were unable to attend the final session of the IEP held on November 21, 2008, because the Student was undergoing a medical procedure to address his seizures

- on that date. They notified the school on November 19, 2008, that they would be unable to attend on the scheduled date, November 21, 2008. Due to the perceived need to complete this annual IEP review, the number of persons involved in developing this IEP, and the three prior meetings that had been held, the District chose to proceed and complete the IEP. (D 285-308)
48. The District sent a Notice of Intent to Implement the IEP that was completed on November 21, 2008. In it, the District states that no parent requests were refused because the parent was not present. (D 284)
 49. The District notified the Parents that the IEP had been completed and suggested a date of December 5, 2008, for the Parents to meet with the school and review the document and add any material that they wished. The Parents and the school team met on December 5, 2008. (D 309-333)
 50. A second meeting to review and/or revise the November 21, 2008, IEP was held on January 9, 2009. The Parents included a four-page document listing concerns which was made part of the IEP that is dated January 9, 2009. (D 309-333)
 51. The Student had an Independent Educational Evaluation (IEE) which was requested by the Parents and funded by the District on January 9, 2009, with evaluation sessions occurring on October 10, November 3, November 5, December 19, 2008 and January 8, 2009 by the Neuropsychologist. In this report, the Neuropsychologist stated that "... current testing, consistent with school report and previous testing, indicated that [the Student's] overall cognitive abilities are in the severely impaired range. His adaptive, communication/language and cognitive development are approximately in the 6 to 10 month range. His gross motor development is upwards of 16 months of age." (P 268 – 274 and Testimony of the Neuropsychologist on day two)
 52. In this IEE, the Neuropsychologist stated that the Student "needs constant supervision for his own safety. Because he is so motorically driven and unsteady and unaware (and moving beyond what his cognitive abilities [are]), he is a safety risk in all environments at all times." This psychologist opines that the Student requires "one-on-one adult supervision to ensure his safety from falls, climbing, reaching and escaping. He is medically fragile with his seizure disorder...[and] he is a constant risk for injury." (P 273)
 53. The Neuropsychologist has further recommended that the Student "receive an ABA Home Program through the District to be implemented in the afternoon and on weekends in his home environment. The combination of school and an ABA home programming will allow for the individualized needs of the Student to address his safety, adaptive, communication and behavioral needs." (P 274)
 54. This same Neuropsychologist also recommended that the Student "continue to participate in his morning school program (Early Childhood special Education) with the consistent one-to-one adult assistant. This current classroom provides positive peers (students with stronger cognitive, language, adaptive, and behavioral skills) and he knows the environment. (P 274)
 55. The initial Intensive Intervention workshop took place at the Student's home on January 24 and 25, 2009 under the supervision of the Lovaas Center for Behavior Intervention. This marked the Student's initial entry into this home program. (P 281-291)

56. Additional Intensive Intervention workshops took place at the Student's home on April 3, 2009, May 20, 2009 and July 6, 2009. (P 294-347)
57. The daily instruction in the Intensive Intervention program focused primarily on "learning to learn" skills such as compliance, fine motor skills, frustration tolerance, 'look at me', matching, non-verbal imitation, play skills, receptive instructions, reinforcement sampling, self-help, sequenced presentations, sign language, singing songs, verbal imitation and yes/no. The program developed incorporated the basic goals and objectives present in the Student's IEP. (P 333 and Testimony of the Lovaas Provider on day four)
58. The Lovaas Provider testified that she had seen progress in the Student since his enrollment in the program at the end of January 2009, and the present time. (Testimony of the Lovaas Provider on day four)
59. On January 28, 2009, Parents requested reimbursement for the Applied Behavioral Analysis program that they were planning to provide under the supervision of the Lovaas Center for Behavior Intervention. They stated they were withdrawing him from school and were placing him in the home program. (D 481-483)
60. A second letter was sent to the school on February 3, 2009, withdrawing him from school because of his fragile medical condition, the failure of the school to notify the Parent when additional support was not available in the classroom in the afternoon and the lack of a consistent 1:1 aide for the Student in the classroom. (D 484)
61. An IEP meeting was held with Parents and school team on February 13, 2009, to review the report of the Independent Educational Evaluation. (D 338-340)
62. On February 17, 2009, the Parents notified the school that the Student would be returning to school on February 18, 2009, provided that there is verification of an additional aide in the classroom at all times to ensure his safety and educational gain. (D 485)
63. A Sensory Profile was completed by the Occupational Therapist with responses from school and home on March 2, 2009. (D 710 – 715)
64. On March 4, 2009, the Parents notified the school that the Student had come home on March 2, 2009, with abrasions on his shoulder blades and back and described as follows: "2 abrasions on his left scapular area measuring: #1 lower abrasion measures 4 cm length, 2 cm width; #2 upper abrasion measures 2 cm length, ½ cm width. There are 2 abrasions on his right scapular area measuring: #1 upper abrasion measures 2 cm length and 5 cm width, #2 lower abrasion measures 3 cm length, 7 am [sic] width. The abrasions are dry, red, and scabbed." The Parent asserts that these abrasions were not present when she got him ready for school. The school personnel questioned by the Parent had no idea how the abrasions got there. (D 486)
65. An IEP meeting was held with Parents and school team on March 20, 2009, to consider the results of an oral/sensory evaluation. (D 345-352)

66. The Student was enrolled for a total of 84 days of instruction during the 2008-2009 school year. He attended the equivalent of 32 days of instruction, counting two ½ day sessions as one day of instruction. (D 512-516)
67. The Student was seen for a yearly follow-up appointment at Rady Children's Hospital in San Diego, California, on June 23, 2009. This Student has been followed for several years by professionals in this program. They found that the Student did not meet the cutoff scores for Autism. (P 369 – 370)
68. In testimony, the Neuropsychologist described the Student as “just dropping to the floor” in a sitting position because he is unable to bend his leg with the braces on and just sits down. Throughout the testimony of the school personnel working with him this description was repeated. The Student was described as “plopping” down on the floor. It appeared to be a willful action as opposed to falling down which most likely would have involved a forward motion (Testimony of the Neuropsychologist on day two, the SET on day five, the Physical and Occupational Therapists on day three, and the SETA 1 on day two)
69. The Student was re-evaluated by the Neuropsychologist on July 21 and 23, 2009, summarized in a report dated July 28, 2009, in preparation for this hearing. The District received a copy of this report in the exchange of documents on August 10, 2009. (P 355-357)
70. In this report, the Neuropsychologist stated that the Student came easily into the environment and was able to tolerate and attend to the testing with short breaks for the 45 minute session. His ability to sit and comply and attend has clearly improved. He was compliant and cooperative.” He was able to complete a number of tasks ranging from 10 months to 24 months on the Bayley-II, an instrument which tests cognitive and motor development. Although he is “out of range” age wise, this instrument is used to show growth from one testing time to another. (P 355 and Testimony of the Neuropsychologist on day two))
71. The Neuropsychologist also observed an ABA session in the home. The student was enthusiastic in his response to the tutor and the activities. He was observed to vocalize and was compliant with requests through the session. He was able to successfully match a cup, spoon, ball, shoe, toothbrush and block. He was able to demonstrate good improvement in attention and compliance during this portion of the program. He was able to imitate several actions with the verbal prompt “Do this_____” (e.g. push toy down, put block in container, pound drums.) (D 356)
72. The Neuropsychologist recommends (without reservation) in her report of July 23, 2009, that the Student continue his ABA-based home program for his learning and development. He has made developmental progress over the past six months. “Most notable is his increased attention to tasks, his compliance to daily living routines within his home program and with his family. He is clearly eager to work within his home program and he is able to sit at a table and follow a simple directed request.”
73. A Psychologist currently engaged in research on the use of Applied Behavioral Analysis techniques with individuals affected by Angelman Syndrome evaluated the Student. The report of that evaluation is dated August 3, 2009 and is based on observations, review of

available documents and direct examination performed on July 6 and 7, 2009. (P 423-452)

74. The Psychologist further stated that although the Student has been assessed by both staff at Rady Children's Hospital in San Diego and Touro University in Henderson to determine whether or not he meets the definition of a child with autism he does not reach the cutoff scores on the instruments used. She further stated that he does share some characteristics of children with autism, specifically communication difficulties, repetitive behaviors and social difficulties. (Testimony of the Psychologist on day one)
75. The Psychologist recommended in testimony that the Student attend a half-day of school because school "is a critically important place for children to be. They learn to socialize, to learn to follow different adults, they learn routines that are important for their development." Additionally, this individual recommends "one-to-one support at school, not only to keep him safe but to provide instructional opportunities for him, to teach him skills, to prompt him, to reward him, to maintain the pace of instruction that he needs so that his learning continues in other settings as well." (Testimony of the Psychologist on day one)
76. The Psychologist further testified that the "younger the child, the less impaired they are developmentally and the greater intensity of the program lead to better outcomes. ... The less impaired you are intellectually, the better you tend to do." (Testimony of the Psychologist on day one)
77. According to the Psychologist, best practice would be defined as "something that is based on accumulated evidence over a period of time with larger numbers of individuals." (Testimony of the Psychologist on day one)
78. The Psychologist reviewed the home ABA program and found that it was consistent with the IEP goals stated for the Student, i.e. communication, motor, self-help, playing and attending skills. They [the IEPs] also addressed compliance, imitation and matching. (Testimony of the Psychologist on day one)
79. The Psychologist acknowledged that as stated in the article reporting on her study of the efficacy of ABA with students with Angelman Syndrome the results "must be viewed with caution." She attributed this to the relative newness of this line of investigation as well as the small number of children involved in the study. (P 418 and testimony of the Psychologist on day one)
80. The evaluation by the Psychologist and the recommendations emanating from that evaluation were delivered to the District at the time of Exchange of Documents on August 10, 2009. The District, therefore, has had no opportunity to consider or make any use of these recommendations in program planning for this Student. (Testimony of the Psychologist on day one and Petitioner's exchanged document P 423 – 452)
81. A member of the Compliance and Monitoring staff stated in a memo to an Instructional Coordinator that the Student could not be considered for the Intensive Intervention Services Home Program without first being determined to be eligible under the category of autism. This individual was not a member of any IEP team making placement recommendations for this Student. While the reliance upon category in making placement recommendations is clearly not appropriate under the IDEA, there is no

evidence that any of the teams involved in the placement recommendations for this Student based their recommendations upon category rather than need. (P 197a and D 181 - 352)

82. A letter dated September 23, 2008, regarding the Student, from the Principal Investigator and Lead Clinical Psychologist in Angelman Syndrome Research at Rady Children's Hospital, San Diego, California, states, "Children with Angelman syndrome are capable of learning. They often have very short attention spans, so their optimal learning environment is a structured one without competing stimuli. Applied behavior analysis (ABA), which has been used successfully in treating children with autism, has shown promise in children with Angelman syndrome. A classroom setting of inclusion with a 1:1 aide is the optimal environment to promote development and is the most desirable circumstance from a medical standpoint to ensure [the Student's] safety." (P 222)
83. The staff at the elementary school to which the Student was assigned testified unanimously that they believed that the Student was safe in that environment and that they were capable maintaining a safe environment for the Student with the current staffing levels. The morning enrollment was six students with three adults and the afternoon enrollment was seven students (two of whom were typically developing peers) with two adults. (Testimony of the School Principal, the School Nurse, the SET and SETA 1, the School Occupational and Physical Therapists and the Speech Language Pathologists 1 and 2)
84. The testimony of those working with or evaluating the Student outside the school has consistently been that the Student requires a one-to-one aide throughout his school day in order to keep him safe. Only one of these individuals (the Neuropsychologist) has observed the Student in the classroom and in her testimony she stated that she did not observe the Student to be left "on his own" at any time during that observation. (Testimony of the Neuropsychologist on day two, the Psychologist on day one, the Lovaas Program Consultant on day four)
85. The SET testified to her use of the principals involved in Applied Behavior Analysis in her testimony regarding the program which she provides within her classroom. She was able to give examples of strategies which she employed in the classroom in order to instruct the Student. (Testimony of the SET on day five)
86. The speech/language therapy program is described in weekly home notes to the Parents from the Speech/Language Therapists working with the Student. (D 545 – 564)
87. The school has developed a total of eight IEPs for the Student beginning with the first one on October 11, 2007 and concluding with the last on March 20, 2009. These IEPs total 126 pages of text. There were at least nine participants and up to sixteen participants at each meeting. Several of the IEPs required more than one meeting to complete (November 21, 2008 and January 9, 2009). Many of the meetings lasted for three hours or more. (D 181 – 352 and Testimony of the Principal and the Parent)
88. The Low Incidence Team member testified that she had provided eight weeks of training to the Parents both in her office and in the home to enable the Parents to gain skills in working with their son. (D 131 – 133 and testimony of the Low Incidence Team (hereinafter LIT) member on day six)

89. This LIT member described the Student when she saw him in June of 2008 as "extremely distractible." He needed a distraction-free zone. Without that his ability to learn would be interfered with. He was "not present" long enough to learn. She also stated that an ABA approach would be appropriate for this child. She worked with the Parents and the child for eight sessions. (Testimony of the LIT member on day six)
90. Both Parents testified to instances of falling in the home and community. They reported these instances to the staff of the school in order to keep them informed. (Testimony of the Mother and the Father on day six)
91. Both Parents testified to the fact that the Student had awakened from sleep and had created sores on his lip and inner cheek by biting himself during the night. (Testimony of the Mother and the Father on day six)
92. The Mother expressed concern that the Student had been allowed to play in the toilet water at school. None of the staff had seen this and it was their testimony that the Student has played in the water in the basin the room in which the toilet was located. (Testimony of the Mother on day six, the Special Education Teacher Assistant 1 (hereinafter SETA 1) on day two, the SETA 2 on day two, and the Special Education Teacher (hereinafter SET) on day five)
93. The Mother expressed her belief that the staff had placed her son in jeopardy by taking him out to the bus early on the first day of school because there was rain and lightning in the area and her son has metal in his braces and was near a chain link fence. The staff explained that they were trying to avoid the crush of students which would come as school was dismissed on that first day of school and there would be many students looking for their buses. (Testimony of the Mother on day six, the Special Education Teacher on day five and the SETA on day two)
94. The Parents testified to finding abrasions on the Student's back when he came home from school on March 2, 2009. Pictures of these injuries were admitted as P 90 – 93. The Father testified that his son did not have these injuries when he went to school in the morning. The Parents requested an inquiry but not information has been transmitted to them nor presented at this hearing as to any findings. (Testimony of the Father on day six and P 90 – 93)
95. The school staff testified that they were unaware of any incident at school that could have produced these marks. (Testimony of the SET on day five and Special Education Teacher Aide 1 on day two)
96. The School implemented a method of communicating between home and school in order to give the Parents information about what was occurring in the school setting. There are numerous instances of ways in which the staff responded to the Student's behaviors by redirecting the Student's attention, providing an alternative (i.e. the chewy toy) prompting him to complete specific actions, providing assistance when needed and paying attention to behaviors and dealing with them as they occurred. (565 – 637)
97. The SET described the curriculum that she uses in the classroom as being "developmentally appropriate." (Testimony of the SET on day five)

APPLICABLE LAW AND REGULATION, CASE LAW AND RATIONALE

Petitioner alleges that the Respondent has failed to provide a free appropriate public education (FAPE) to the Student in that Respondent:

- a. Prevented the Parent from a meaningful participation in the IEP process by predetermining educational placement in November of 2007 and in September of 2008 elected a placement based on economic factors rather than Student need;
- b. Failed to consider the medical and behavioral material presented by Petitioner to the IEP team;
- c. Failed to consider the unique needs of the child as required by IDEA both with regard to his diagnosis of autism as well as that of Angelman Syndrome;
- d. Failed to fulfill its duty to confer meaningful education progress. The District's proposed program must address the Student's unique needs, provide some educational benefit and comport with the IEP. In the instant case, Petitioner alleges that Respondent has failed to provide Petitioner with appropriate supplementary services by failing to implement behavioral supports. It is alleged that Petitioner requires a one-to-one aide through the school day in order to benefit from his education.
- e. Failed to recognize that Student requires positive behavior supports composed of individualized interventions that foster positive changes in behavior that are observed in school, home and community. The program provided to Petitioner lacked the utilization of frequent and systematic positive reinforcement scheduling.
- f. Failed to appropriately place Student as of September, 2008, and instead placed him in a placement which was medically unsafe and failed to address the possibility of bodily harm or self-injury.

A free appropriate public education is broadly defined in the Part B regulations as special education and related services that are provided at public expense, under public supervision and direction and without charge; meet the standards of the State Education Agency and the requirements of Part B of the Individuals with Disabilities Education Act; include an appropriate preschool, elementary or secondary school education in the state involved; and are provided in conformity with an individual education program (IEP) that meets the requirements of 34 C.F.R. 300.320 – 300.324. The specific requirements of an appropriate education must be decided on a case-by-case basis, in light of the unique needs of each individual child.

In the case entitled *Board of Education of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 553 IDELR 656 (1982), the Supreme Court established a two-part analysis that courts must use to decide appropriateness:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA's procedures reasonable calculated to provide educational benefit?

a. Petitioner alleges that Respondent prevented the Parent from a meaningful participation in the IEP process by predetermining educational placement in November of 2007 and in September of 2008 elected a placement based on economic factors rather than Student need;

34 C.F.R. 300.501(b) guarantees the right of the parent to participate in meetings with respect to the identification, evaluation and educational placement of the child as well as the provision of FAPE to the child. Placement decisions must be "individually determined based on each child's

abilities and needs and each child's IEP and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space or administrative convenience."

34 C.F.R. 300.116 provides in relevant part that "in determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that (a) the placement decision (1) is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) is made in conformity with the LRE provisions of this subpart."

As cited, the IDEA requires that parents be allowed to fully participate in the development of their child's IEP. That participation does not, however, mean that, as the Ninth Circuit has stated in *Ms. S. v. Vashon Island Sch. Dist*, 39 IDELR 154 (9TH Circuit, 2003) "while the school district must allow for meaningful parental participation, the parent does not have a veto power over any provision of the IEP."

In coming to this conclusion, the Ninth Circuit relied on the language of *Doe by Gonzalez v. Maher*, 557 IDELR 553 (9th Circuit, 1986) which holds that

In discussing parents' participatory role in developing IEPs for their children, the [Supreme] Court observed that Congress, '[a]pparently recognizing that [a] cooperative approach would not always produce a consensus between the school officials and the parents, and that in any dispute the school officials would have a natural advantage, incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements.' We construe the Court's language as a recognition that, although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. If the parties reach a consensus, of course, the [IDEA] is satisfied and the IEP goes into effect. If not, the agency has the duty to formulate the plan to the best of its ability in accordance with information developed at [prior] meetings, but must afford the parents a due process hearing in regard to that plan.

A properly constituted Multidisciplinary Team (including the Parents) that incorporated much information offered by the Parents of the Student based this IEP upon the initial evaluation of the Student. The IEP sets forth the present levels of performance of the Student, his educational needs based on those levels, goals and benchmarks designed to offer instruction in those areas, related services to address demonstrated needs as well as modifications and accommodations in the school setting. The Parents agreed to the provisions in this IEP. (Findings of Fact (hereafter FOF) 5 through 13)

Within two weeks of the development of this IEP, the Parents contacted the School District and asked to reconvene the IEP Team to discuss concerns which they had regarding the proposed program such as safety of the Student, length of designated related service times, program options, an Applied Behavioral Analysis program and a 1:1 aide. The District responded with a Notice of Intent to Implement the October 11, 2007, IEP in which it also stated an agreement to reconvene the IEP to discuss the Parent concerns that had arisen subsequent to the October 11 meeting. (FOF 16)

During the meeting held on November 16, 2007, the Parents presented material regarding the feeding precautions necessary for the Student. All required personnel were present at the meeting in addition to an advocate for the Student and his private Speech/Language Pathologist. (FOF 17 - 18)

The Parents also expressed concern regarding safety at school, time designated for related services, their preference for a full-day program with ABA instruction and a 1:1 aide for the Student. (FOF 19)

As a result of a review IEP meeting held on November 16, 2007, the District added 30 minutes of speech/language therapy time per week. 15 minutes of occupational therapy time per week and consultation by the school nurse of 15 minutes per week. In their notice to implement this revised IEP, the District stated that eight weeks of intervention to compile data would be necessary to determine whether educational gain was being made in the proposed program. The team further agreed that there would be no more than six students assigned to the classroom through January 2008, and a floating classroom aide would be made available to assist the Student with his transition to the classroom. An assessment summary was listed with this IEP along with the goals and benchmarks developed in the IEP that was used as a basis for the selection of the current placement recommendation. (FOF 20 - 26)

With regard to the placement in September 2008, it is the contention of the Parents that the District's placement was made on the basis of monetary consideration. There is no testimony given by the Parents or any of the Parent's witnesses that addresses that contention.

The only mention of money comes in a letter to the District written on September 25, 2008, in which the Parents state that they believe "the school district must provide a Free Appropriate Public Education for our son [] regardless of cost or funding issues." (FOF 40)

Although the Parents' clearly expressed preference has been for Intensive Intervention Services in the home, the District developed an IEP based on demonstrated Student needs and proposed to deliver that program in a self-contained classroom for pre-school special education students located in the Student's home school in conformity with the provisions contained in 34 C.F.R. 300.116 and 34 C.F.R. 300.327 relating to recommendations for placement based upon those IEPs and the parents as participants in that meeting.. (FOF 20 - 26)

The participation of the Parents in the November 16, 2007, IEP is well documented. The Parents agreed with the IEP as written on October 11, 2007. Thereafter, they raised some concerns with the IEP and the District agreed to reconvene the IEP meeting to discuss those concerns. After discussion, it was agreed that there would be additional time spent in direct service in both the area of Speech/Language Therapy and Occupational Therapy. An additional teacher aide was placed in the classroom to assist with transitioning into the school program. The District responded to the concerns expressed.

There is a lack of any testimony or documentary evidence regarding the allegation that the placement recommendation in September 2008, was based on economic factors rather than student need. The Petitioner has not met his burden of proof in regard to this allegation.

The IEPs developed for the Student and upon which his placement is based have followed the prescribed procedures: the placement decision was made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options and it was made in conformity with the LRE provisions of IDEA. The placement recommendations have been based on the demonstrated needs of the Student and a placement in which the goals and objectives developed for the Student can best be delivered. The Parents have had multiple opportunities to participate in the development of their son's IEPs and have availed themselves of those opportunities. The ultimate placement for this Student was for a self-contained program in the school that he would normally attend.

HELD: For the Respondent.

b. Petitioner alleges that the Respondent failed to consider the medical and behavioral material presented by Petitioner to the IEP team.

As previously cited, the IDEA requires that parents be allowed to fully participate in the development of their child's IEP and "the IEP team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child." (34 C.F.R. 300.324)

Beginning with the initial evaluation, materials gathered by the Parents' from various sources in the community have been included in and considered by the Multidisciplinary Team as well as the IEP teams developing educational programs for the Student. (FOF 5 and 6)

At the initial evaluation, information from various medical professionals having contact with Student was included. The staff was made aware of various problems with mobility, feeding, seizures, gastroesophageal reflux disorder (GERD), his diagnosis of Angelman Syndrome and his need for occupational therapy, physical therapy and speech/language therapy. This information was considered and incorporated into the MDT report as well as the initial IEP. (FOF 4, 9, 10, 18, 20, 26, 27, 41, 42, and 44)

Accommodations and modifications dating from the first IEP (October 10, 2007) include "Medical Alert for Seizures to be shared with teachers and care givers; Parents are asked to keep the teacher and nurse updated in [the Student's] health status, medications and treatments; Establish a form of home communication; Once medication documentation is obtained re: eating/drinking, reconvene IEP as appropriate; Provide a structured and routine environment with close adult supervision for safety; OT/PT will provide any necessary equipment; [The Student] requires adult assistance in order to participate and benefit from all activities. (FOF 10)

The accommodations were modified in November of 2007 to include information regarding the Student's need for specific routines and procedures to be used when feeding him. (FOF 20)

A physician's report was included in the November 16, 2007, IEP indicating parameters for feeding this Student at school. The report states that he "can be fed at school with 1:1 supervision. Due to GERD feeding should be given with aspiration precautions." The School Occupational Therapist trained staff in the appropriate methods to use when feeding Student. (FOF 18)

The Student's Pediatrician requested air-conditioned school transportation. This was written into the IEP. A transportation aide also accompanies the Student on the bus. (FOF 9)

In her report of an observation of the Student by the School District's Behavior Mentor, it was noted that the Student "received one to one attention from either the teacher or an aide as he participated in all of the classroom routines." It was also observed that the Student "best responded to directions and information presented to him when this information was given to him at his eye level, paired with a visual cue, and in trials." (FOF 31)

An Independent Educational Evaluation was requested by the Parents and funded by the District. The Neuropsychologist recommended in her January 9, 2009 report that the Student

"continue to participate in his morning school program (early childhood special education) with the consistent one-to-one adult assistant. This current classroom provides positive peers (students with stronger cognitive, language, adaptive, behavioral skills) and he knows the environment.) (FOF 51)

The Neuropsychologist has further recommended that the Student "receive an ABA Home Program through [the District] to be implemented in the afternoon and on weekends in his home environment. The combination of school and an ABA home programming will allow for the individualized needs of the Student to address his safety, adaptive, communication and behavioral needs." (FOF 53)

There has been no evidence of the Student having been left "on his own" in the classroom setting. (FOF 84)

The SET has been trained in the use of Applied Behavioral Analysis and was able to give examples of strategies which she employed in her classroom as she was instructing the Student. (FOF 85)

The testimony of the Psychologist had not been shared with the District prior to its submission in documentation for this hearing. The District has, therefore, been unable to respond to any of the recommendations made by this individual. (FOF 75)

The District has demonstrated in its documentation and testimony of school staff that it has not only received and disseminated as appropriate the information provided from outside sources, but has on most occasions incorporated those recommendations into the Student's educational program via the IEP.

An additional aide was added to the classroom in the morning, training given to the teacher and teacher assistant in ABA and those principals were used by the professionals working with the Student in the classroom.

The Law requires consideration of the material presented. Consideration is not equivalent to adoption. The District has adopted the recommendations that it believed were necessary to provide an appropriate education to this Student. It is not required to do more.

HELD: For the Respondent.

c. Petitioner alleges that Respondent has failed to consider the unique needs of the child as required by IDEA both with regard to his diagnosis of autism as well as that of Angelman Syndrome;

The law with regard to this allegation is the same as above; the Multidisciplinary Team as well as the IEP team is bound to consider information presented to them by the Parents or other professionals. (See 34 C.F.R. 300.324)

The allegation above leads one to infer that this Student has been diagnosed with as a child with Autism. As shown in the next three paragraphs, that is not the case nor is it an issue before this Hearing Officer. There has been no allegation that the category under which the Student is eligible for services is incorrect. I will however, deal with the label as it concerns the above allegation that the Respondent "failed to consider the unique needs of the child...with regard to his diagnosis of autism."

An evaluation of the Student conducted by Rene Barbieri-Welge at the Rady Children's Hospital in San Diego, California, found the Student did not meet the cutoff scores under the Autism Diagnostic Observation Schedule. (FOF 65)

A School District Multidisciplinary Team met on May 19, 2008, and found him not to be eligible under Nevada Administrative Code 388.340.4 with the Mother signing in disagreement. (FOF 36)

A psychologist at Touro University evaluated the Student and found him to be Non-Autistic as profiled by the Autism Diagnostic Observation Schedule and the Childhood Autism Rating Scale on August 12, 2008. (FOF 38)

None of the professionals who have evaluated this Student for autism have diagnosed him as autistic or found him eligible for services as a Student with Autism according to the Standards of the State of Nevada, Department of Education as set forth in N.A.C. 388.340.4.

There is, therefore, no need to consider the unique needs of this Student with regard to his diagnosis of Autism because he has no such diagnosis.

However, with regard to his diagnosis of Angelman Syndrome, there is certainly a mandate to consider the needs of the Student as he is affected by this disorder. The characteristics most commonly mentioned when referring to children with Angelman Syndrome include the following: severe intellectual disability, seizure disorder, motor dysfunction, absent or minimal expressive speech and happy demeanor with frequent bouts of laughter. (FOF 4)

The initial IEP with its Present Levels of Performance refers specifically to Angelman Syndrome and delineates many of the characteristics of this Student that are consistent with those found in Angelman Syndrome. (FOF 6)

The District has received and incorporated the recommendations of medical professionals with regard to the effects of Angelman Syndrome. (FOF 27 and 41)

The IEPs developed for this Student contain goals and objectives dealing directly with the developmental delays as well as the lack of speech and communication skills. There are goals and objectives related to the present levels of performance and Angelman Syndrome. (FOF 7)

In addition to the above goals and benchmarks, speech/language therapy, occupational therapy, and physical therapy have all been provided. (FOF 8)

The District has considered the effects of Angelman Syndrome in its evaluations and program planning and, as these effects relate to the educational environment, has developed programs designed to meet this Student's needs.

The District has provided a curriculum designed to teach functional skills. The speech and language needs of the Student have been addressed in the provision of direct service speech/language therapy as well as weekly consultations between the speech/language pathologist and the classroom teacher in order to provide consistency throughout the school program for this Student.

Both Physical and Occupational Therapy have been provided to assist the Student with the development of his motor skills.

Feeding procedures have been specified and followed in the school setting. Additional assistance has been placed on the school bus and an air-conditioned bus has been provided.

The District has met its obligation to consider the implications of Angelman Syndrome and has included those aspects in its program planning and execution.

HELD: For the Respondent.

The next two issues will be dealt with together for clarity.

d. Failed to fulfill its duty to confer meaningful education progress. The District's proposed program must address the Student's unique needs, provide some educational benefit and comport with the IEP. In the instant case, Petitioner alleges that Respondent has failed to provide Petitioner with appropriate supplementary services by failing to implement behavioral supports. It is alleged that Petitioner requires a one-to-one aide through the school day in order to benefit from his education.

e. Failed to recognize that Student requires positive behavior supports composed of individualized interventions that foster positive changes in behavior that are observed in school, home and community. The program provided to Petitioner lacked the utilization of frequent and systematic positive reinforcement scheduling.

As set forth in the regulations developed to implement the IDEA at C.F.R. 300.324 regarding the development, review and revision of an IEP, the IEP team must consider "the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child and the academic, developmental and functional needs of the child." It must also consider special factors "as in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" and also consider "whether the child needs assistive technology devices and services."

In *Board of Education of Hendrick Hudson School District v. Rowley* 553 IDELR 656 (U.S. 1982), the United States Supreme Court made it clear that IDEA does not require provision of the best possible educational program. Referring to the minimal level of benefits that an appropriate educational program must confer, the Court termed the State's obligation as providing a "basic floor of opportunity."

In *J.L. v Mercer Island*, 52 IDELR 241, (9th Circuit, 2009), the Ninth Circuit revisited its view of the requirements set forth in *Rowley*, and found that "[h]ad Congress sought to change the free appropriate public education 'educational benefit' standard—a standard that courts have followed vis-à-vis *Rowley* since 1982—it would have expressed a clear intent to do so" and it has not. The case was remanded with instructions to apply *Rowley*'s basic floor of opportunity standard.

As the Ninth Circuit has opined in *Joshua A. v. Rocklin Unified School District*, 52 IDELR 64 (Ninth Circuit, 2009)

"We need not decide whether the district made the best decision or a correct decision, only whether its decision satisfied the requirements of the IDEA."

In *Gregory K. v. Longview*, 558 IDELR 284 (9TH Circuit, 1987), the Court found that "Here, the evidence demonstrates that the proposed placement was designed to match the strengths and weaknesses that emerged from testing of Gregory's achievement and was reasonably calculated to provide education benefits for Gregory. As such, it was an "appropriate" public education under the Act. ... Even if the tutoring were better for Gregory than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide Gregory with educational benefits."

In *Adams v. Oregon*, 32 IDELR 130 (9th Circuit, 1999), the Court found that we are to look to the "goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the Student] with a meaningful benefit. This follows *Gregory K v. Longview*, 558 IDELR 284 (9TH Circuit, 1987) where the Court found that the "[A]ctions of the school systems cannot... be judged exclusively in hindsight... [A]n individualized education program ("IEP") is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted."

One of the main areas of contention during the many IEP meetings held for this Student has been the Parents' belief that the Student requires a 1:1 aide in order for him to achieve any benefit from his education.

We first turn to the IEP itself. This document was developed by an appropriately constituted team that included the Parents. The goals and objectives are based upon the demonstrated present levels of performance of the Student. The related services, modifications and accommodations are based on this Student's demonstrated areas of need. (FOF 6 – 10)

It is the position of the District that the number of adults in this classroom (three in the morning and two in the afternoon) related to the number of students enrolled (six in the morning and five in the afternoon) allows adequate support and supervision for this Student. (FOF 83)

In all observations by individuals not normally assigned to the classroom, whether from the District or privately-employed individuals, none has noted that the Student was left unsupervised, unattended or unengaged while participating in the activities of this classroom. (FOF 79)

The Special Education Teacher herself testified that she believed that the Student could be safely educated with the current staff available. (FOF 78)

The services provided to the Student in the classroom do provide elements of Applied Behavioral Analysis in the presentation of a request, provision of assistance or prompting, and rewarding of the Student when the answer is correct. (FOF 30 and 80)

The Neuropsychologist selected by the Parents to do the Independent Educational Evaluation points to the values inherent in a school placement including socialization with peers and those functioning at a higher level than the Student and the opportunity to learn classroom routines. In the case of this Student, those inherent values of the classroom are combined with

instructional goals and benchmarks designed to assist the Student in learning appropriate behaviors and pre-academic skills. (FOF 52)

The Multidisciplinary Team at Touro University has recommended that the Student would benefit from intensive treatment for his behavioral symptoms. "This type of therapy can serve to increase the amount of time that [the Student] is able to focus on a task..." (FOF 39)

The Low Incidence Team member who had furnished instruction to the Parents through the Connection Center believed that an ABA approach would be appropriate for this child. (FOF 89)

The Parent has expressed a preference for an Applied Behavioral Analysis in-home program with Discreet Trial Training. This type of program is often used with students with autism and is, in fact, offered as an adjunct to the autism program in this District. The Psychologist testifying for the Petitioner is currently engaged in research (the first peer-reviewed report of which was published in April of this year) to examine the efficacy of such a method with regard to its use with children with Angelman Syndrome. The study involved three children and has produced encouraging results with regard to outcomes. It is, however, preliminary and as stated by the researcher herself, "the results must be viewed with caution." (FOF 79)

The Parents removed the Student from placement in his Early Childhood Special Education Program in March of 2009. They began providing an intensive in-home program through the Lovaas Center for Behavior Intervention with a workshop on January 24 and 25, 2009. (FOF 55 and 56)

The Lovaas Supervisor stated that she based her program design on the goals and benchmarks which were a part of the IEPs developed for this Student. (FOF 57)

The intensive intervention home program is supervised by the Lovaas Program Supervisor who has testified to the growth she has seen in the Student since he began his participation in this program. (FOF 58)

The Ninth Circuit has been consistent in its stand on the provision of FAPE as it relates to the "basic floor of opportunity" standard set so many years ago in *Rowley*. In *Gregory K.* it held that an appropriate public education does not mean the absolutely best or "potential maximizing" education for an individual child. It has consistently held that the District is not obligated to provide a Cadillac rather than a serviceable Chevrolet.

In this instance, the Student has been provided with a program based on his demonstrated needs and designed to enable him to develop skills and strategies that will assist him in acquiring new skills. The District has, in its IEPs, recognized the behaviors of the Student that need to be addressed and has provided strategies and supports to enable the Student to gain educational benefit in the classroom. There has been no evidence that the Student has been left unsupervised, unattended or unengaged in the classroom setting. The District does recognize the possibility of injury to the child and has taken steps to minimize that risk.

This Hearing Officer takes note of the recommendations of various outside providers in stating that the Student needs a 1:1 aide and an intense behavioral program. The Parents have provided such a program to the Student since January 25, 2009. The Student has made some progress in that program as testified to by his Parents, the Neuropsychologist and the Lovaas Service Provider. Would the Student have made the same progress in the school? We will never know. The Student did not attend after March 3, 2009, and his attendance before that

date was sporadic. He attended less than half of the days on which he was enrolled. (FOF 66) That is not, however, the issue. The issue is whether or not the District's program as set forth in its IEPs was designed and developed to provide an appropriate education for this Student. I believe that it was.

The record is replete with instances of modifications to the program based on recommendations from outside providers and concerns expressed by the Parents. The staff is well acquainted with the needs of this Student and have provided a program in his school which is designed to provide functional skills which will aid in his development. There is no evidence that the designation of a "1:1" aide would have increased the instructional time that he had in the program. As has been found by both District staff and outside observers, the Student has not been "unengaged" or "unsupervised" during his time in the classroom.

I find that the programs as set forth in the IEPs dated October 17, 2009, and January 9, 2009, do provide for a basic floor of opportunity for this Student and provide appropriate behavioral supports and services to enable him to gain educational benefit.

HELD: For the Respondent

f. Failed to appropriately place Student as of September, 2008, and instead placed him in a placement which was medically unsafe and failed to address the possibility of bodily harm or self-injury.

The Parents have kept the school well informed regarding the nature and seriousness of their son's conditions. Several medical professionals have forwarded recommendations and information to the school. This information has been included in the IEPs, the training that the staff received from the school nurse, the ongoing supervision of the school nurse vis-à-vis the child's health status and need for precautions, the supervision and training by the Mother of the staff in feeding methods for her son, the involvement of the Occupational Therapist in feeding the Student and in incorporating recommendations from outside providers. The following facts pertain to the involvement of the school in their attempts to keep this Student safe. (FOF 8, 9, 10, 12, 20, 26, 29, 30, 31, 32, 61, and 63)

The staff is very aware of the Student's limited mobility and his tendency to rush forward without fear going beyond his limited physical capacity. (FOF 89)

There have been several allegations by the Parents of instances where they believe the school was negligent in its duty to keep the Student safe.

The first involves a rainstorm on the first day of school of the 2008-2009 school year. The teacher and aide took the Student and a classmate to the bus early in an attempt to avoid the chaos of the first day of school and children looking for their own buses. As they took the child to the bus, it began to rain. The Student's Parent was there, put him in her own car and went on to an appointment. Within a minute or so it began to rain heavily and the Principal held the rest of the students inside until it had subsided. The Parents believe the Student was in danger due to the metal contained in his braces and the proximity of a chain-link fence. (FOF 87)

Another incident involves a dispute over whether or not the Student was allowed to play in the water in the toilet or whether or not, as school staff testified, he splashed in the water in the basin as he was being assisted with the task of washing his hands after toileting. (FOF 86)

The school staff noted one incident where the Student did fall on the playground when the class was outside and credited the heavy coat he was wearing with his not being hurt. The Mother, in her testimony, stated that she believed that the school had blamed the fall on his wearing the coat rather than the school's belief that it saved him from harm. The written testimony is contrary to that statement and it may be illustrative of misunderstandings in communication. The Parents did not actually witness any of these incidents (other than the rain on the first day of school) and may have misinterpreted statements by school staff. (FOF 88)

An incident occurred immediately preceding the removal of the Student from the school program. The Student was observed by the Father to have abrasions on his scapular area when he came home from school which the Father testified had not been there when he was sent to school. When the Parents showed the school staff these abrasions, they said that they had no knowledge of how he acquired the abrasions and likened them to "rug burns." Neither the Parents or the School Staff, when questioned under oath, had any idea how these injuries occurred. (FOF 64)

There was no "meeting of the minds" with regard to these allegations at the hearing. All staff questioned during the hearing responded that they had never seen the Student playing in the water in the toilet nor would he have been allowed to do so. No one was aware of an incident which would have led to the scrapes on the child's back that were noticed by the Parents at home and brought to the school's attention.

The Student does grind his teeth (both at home and school) and he does bite on his lip and inner cheek (both at home and at school). The School staff testified to their attempts to stop these behaviors when they occurred in the classroom by offering his "chewy toy", refocusing his attention and rewarding the appropriate behaviors. (FOF 96 and testimony of the SET on day five and the SETA on day two)

The SET, the Occupational Therapist, the School Principal and other school staff, testified to the arrangements within the classroom such as keeping the floor free of clutter and having someone in proximity to the Student at all times, assisting the Student in acquiring skills related to his mobility (the Physical Therapist) and the measures taken to insure his safety when feeding him or helping him move about the school environment as needed. These measures are also reported in the home notes sent from school to Parents. (FOF 89)

The District has provided additional assistance in the classroom when it believed it was necessary and has responded to requests for medical providers in the community by incorporating their information into the IEPs developed for this Student. The level of assistance provided by the District was appropriate.

The staff has made consistent attempts to redirect the Student when they have noticed behaviors which are self-injurious.

It is the opinion of this Hearing Officer that the District has provided an environment which is designed to be as free from danger as possible and its staff has responded appropriately to instances where the Student has chewed or bitten his lip. They have been vigilant with regard to medical procedures and have incorporated cautionary language in the IEPs developed for the Student with regard to feeding strategies.

The room itself is free from clutter and the staff is aware of the Student's propensity for hasty movements. Therapists have been involved in teaching the Student strategies for dealing with possible hazards (such as uneven walking surfaces) in his surroundings.

I find that the District took proper precautions to keep the Student safe in the school environment.

HELD: For the Respondent.

Having made the decisions above, the Hearing Officer believes it necessary to comment on the lengths to which the Parents have gone to provide the best possible services for the child. The Hearing Officer is conscious of the fact that these Parents want the best for their child and have not spared themselves in attempting to obtain that for him. That being said, I turn to the words of the Ninth Circuit to better express my position:

The court is conscious that the parents of Joshua A. want to do everything possible for their son and that they may feel deeply frustrated by the decisions of persons not as familiar as they are with their son's needs and aptitudes. In the context of public education and public funding such deep personal feelings, deserving as they are of great respect, do not have a decisive role in determining the outcome in a court of law.

Joshua a. v. Rocklin Unified School District, 52 IDELR 64 (9th Circuit, 2009)

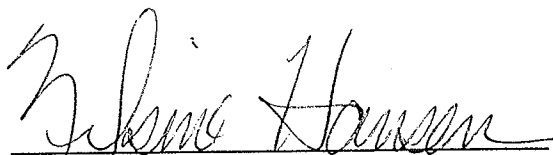
ORDER

It is the judgment of this Hearing Officer that the District has offered a free appropriate public education to the Student, both procedurally and substantively

APPEAL RIGHTS

This decision and order will be binding on all parties to this hearing. Either party may appeal this decision made pursuant to Nevada Administrative Code 388.310 in writing within thirty (30) days after receipt of the Decision. Such a request should be sent to the State Superintendent of Public Instruction who will then appoint a review officer. A cross-appeal may be filed within ten (10) days of receipt of the appeal.

Dated this seventh day of September 2009.


Nilsine Hansen
Impartial Hearing Officer